Yusaini bin Mat Adam v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42-27 OF 1997
KC VOHRAH J
29 JULY 1999

Evidence *— Witness — Child witness — Taking of evidence — Failure to follow procedure — Court held inquiry as to whether swarn testimony is to be given — Whether court must examine whether child had sufficient appreciation of the responsibility of telling the truth — Evidence Act 1950 s 133A*

The sessions court convicted the appellant for the the offence of rape committed on a girl aged 10 years 8 months. The girl was of the age of 11 when she gave evidence in court during the trial. Despite the fact the girl was a child of tender years, the court did hold an inquiry to form an opinion whether the child was in the position to be sworn in accordance with the requirements under s 133A of the Evidence Act 1950 ('the Act'). The girl gave contradictory evidence and the observations noted by the sessions judge showed that the she behaved strangely through the trial. The appellant appealed.

Held, allowing the appeal:

The court when accepting the evidence of a child of tender years ought to have examined whether the child had sufficient appreciation of the responsibility of telling the truth over the ordinary duty to tell the truth upon pain of punishment for perjury. On the failure of the session court judge to follow the procedure in s 133A of the Act, the conviction should be set aside (see p 586B–C, E).

Obiter:

Since s 38 of the English Children and Young Persons Act 1933 has been repealed, it should be considered whether the same should be done with s 133A of the Act, bearing in mind the experience of other Commonwealth countries on the matter of children's evidence in our court and, also that, in our judicial system, jury trials have been abolished. In addition, rules relating to corroboration need a re-look and the necessity for the examination procedures of child witness to be child-friendly need to be taken into account (see p 586E–G).

[Bahasa Malaysia summary

Mahkamah Sesyen telah mensabitkan perayu atas kesalahan rogol yang dilakukan ke atas seorang budak perempuan berusia 10 tahun 8 bulan. Budak perempuan tersebut berusia 11 tahun semasa perbicaraan. Meskipun fakta menunjukkan bahawa budak perempuan tersebut adalah di bawah umur, mahkamah telah mengadakan suatu penyiasatan untuk membentuk satu pendapat sama ada budak

A tersebut di dalam kedudukan untuk mengangkat sumpah menurut s 133A Akta Keterangan 1950 ('Akta tersebut'). Budak perempuan itu telah memberi keterangan yang bercanggah dan penelitian yang diambil oleh hakim mahkamah sesyen menunjukkan bahawa beliau berkelakuan ganjil sepanjang perbicaraan tersebut.

B **Diputuskan,** membenarkan rayuan tersebut:

Mahkamah apabila menerima keterangan seorang budak di bawah umur seharusnya memeriksa sama ada budak tersebut mempunyai kesedaran yang mencukupi tentang tanggungjawab untuk memberitahu kebenaran selain lebih daripada tanggungjawab biasa
C untuk memberitahu kebenaran atas hukuman sumpah bohong. Kegagalan hakim mahkamah sesyen untuk mengikut prosedur di dalam s 133A Akta tersebut, sabitan tersebut hendaklah diketepikan (lihat ms 586B–C, E).

D **Obiter**:

Memandangkan s 38 English Children and Young Persons Act 1933 telah dimansuhkan, hendaklah diambil kira sama ada yang sama mesti dibuat dengan s 133A Akta tersebut, dengan mengambil kira pengalaman negara-negara Komenwealth yang lain tentang perkara berhubung keterangan kanak-kanak di mahkamah kita dan, juga
E bahawa, di dalam sistem kehakiman kita, perbicaraan-perbicaraan juri telah dihapuskan. Tambahan pula, peraturan-peraturan berhubung dengan sokongan perlu dilihat semula dan keperluan suatu siasatan ke atas prosedur-prosedur saksi kanak-kanak dijadikan mesra-kawan perlu diambil kira (lihat ms 586E–G).]

F **Notes**

For cases on child witness generally, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1657–1663.

G **Cases referred to**

Muharam bin Anson v PP [1981] 1 MLJ 222 (refd)
R v Hayes (1977) 64 Cr App R 194 (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174 (refd)

H **Legislation referred to**

Children and Young Persons Act 1933 s 38 [Eng]
Criminal Justice Act 1988 s 33A [Eng]
Criminal Justice and Public Order Act 1994 Schedule 9 [Eng]
Evidence Act 1950 s 133A
I Oaths and Affirmation Act 1949 ss 2, 14

Gurbachan Singh (*Bachan & Kartar*) and *Radzuan Ibrahim* (*Radzuan Ibrahim & Co*) for the appellant.

Stanley Clement Augustin (Deputy Public Prosecutor) for the respondent. A

KC Vohrah J: The sessions court convicted the appellant for the offence of rape committed on his stepdaughter, a girl aged 10 years 8 months. The rape was allegedly committed in the family flat at Cheras, Kuala Lumpur.

The evidence of the girl was that on the morning of 25 May 1996 her family including the accused left the 15th floor flat to go to the ground floor. B Then the accused came back and sent the girl's elder brother down with his car key. As the girl was about to leave the flat the accused prevented her from doing so and then he raped her.

She gave her evidence in court on 14 October 1996. She was then just slightly over 11 years of age. When a child of tender years is called to be a C witness the procedure is for the court to hold an inquiry to form an opinion if the child is in the position to be sworn (see eg the Federal Court case of *Muharam bin Anson v PP* [1981] 1 MLJ 222 at p 223). However, the sessions court judge did not hold such an inquiry before she allowed the child to give her evidence.

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Unfortunately in this case neither the learned judge of the sessions court nor the deputy public prosecutor nor the counsel who acted for the appellant in the court below appeared to have been aware of s 133A of the Evidence Act 1950 which reads:

> Where, in any proceedings against any person for any offence, any child of E tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code of the Federated Malay States shall be deemed to be a F deposition within the meaning of that section:
>
> Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material in evidence in support thereof implicating him.

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Section 133A which was introduced in the Evidence Act 1950 in 1971 (see PU (A) 261/71) is the equivalent of s 38 of the English Children and Young Persons Act 1933 (repealed since 1991).

In England, prior to 1933, children could testify in criminal proceedings only if they were found competent to swear the same oath as H adult witnesses. Section 38 of the English Act first introduced the principle of unsworn evidence in criminal cases.

In *R v Hayes* (1977) 64 Cr App R 194, Hayes was charged with inciting three boys to commit acts of gross indecency with him, and also with committing an act of gross indecency with one of them. The boys were called as witnesses and the two older boys, aged 11 and 12, were sworn after I being examined by the judge. The judge's questions during his examination were to a large extent concerned with the boys' religious understanding, but

A it was clear that the oldest boy, in particular, had little if any religious belief. The appellant claimed that the boy should not have been sworn in those circumstances, but the Court of Appeal upheld the trial judge's decision. Bride LJ said at 196:

> It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised. *The important consideration we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal, social conduct.* (Emphasis added.)

C As was observed by Andrews & Hirst in *Criminal Evidence* (3rd Ed, 1997):

> The competence of a child could never be presumed. Even for the purpose of giving unsworn testimony, it was still necessary to establish by positive means that the child understood the ordinary duty of telling the truth. It was the duty of a court or judge to determine competence and the proper level of competence before proceeding to admit evidence from a child. This could involve the child being asked questions by the trial judge, and it could also involve the calling of expert opinion evidence from child psychologists. If a child was allowed to testify without such prior examination, any conviction based on that child's evidence was liable to be quashed on the ground of material irregularity (*R v Khan* (1981) 73 Cr App R 190).

E If the sessions judge had, after an inquiry, decided that 'the child had a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking the oath, over and above the duty to tell the truth which is an ordinary duty of normal, social conduct' the judge would have been on guard when assessing the evidence of the child.

F It is disquieting to observe that the child might have rehearsed the evidence she was to give in court or coached to give the sworn evidence by her mother's sister, SP2. During cross-examination the child witness said:

> Saya ada bincang dengan mak cik tentang perkara ini. Saya setuju apa saya cakap di mahkamah inilah mak cik yang suruh ... mak cik yang suruh saya buat. Mak cik dan bapa tiri ada bergaduh ...

G The next day, during examination-in-chief, she changed the story:

> Semalam saya tak faham soalan. Tak betul makcik dan pakcik suruh cakap begini di mahkamah.

H Then there was this observation by the sessions court judge that the girl sometimes cried when she was to relate what had happened, sometimes she turned pale and sometimes she refused to speak and that the court had to adjourn the proceedings several times in order for her to clear her mind before she testified. The judge also observed that she appeared to be afraid of the deputy public prosecutor, the counsel for the defence and the I accused. She remarked, too, that at times when the child was called in to be identified by witnesses who were testifying she refused to enter the court and instead stood by the doorway of the court and quickly moved away.

Another observation by the judge was that she refused to speak in court unless the husband of her aunt was present and that at the beginning the court allowed him to be in as the court thought he was not involved as a witness. A

I have set out one aspect of the contradictory evidence of the child and the observation of the sessions court judge on the girl to show the girl who was 11 years old when she appeared in court to give evidence was certainly of 'tender years' and ought to have been examined as to whether she had sufficient appreciation of the solemnity of the occasion and the added responsibility of telling the truth over the ordinary duty to tell the truth upon pain of punishment for perjury under s 14 of the Oaths and Affirmation Act 1949. Only after the sessions court judge had satisfied herself on the above should the child then have proceeded to take an oath or make an affirmation to tell the truth under the Oaths and Affirmation Act 1949 (see eg the procedure adopted by the trial judge in *Tham Kai Yau & Ors v PP* [1977] 1 MLJ 174 at p 175C). Otherwise the child's evidence should have been taken and reduced in writing following the procedure under 133A of the Evidence Act 1950. Even then under s 8 of the Oaths and Affirmation Act any person 'who by reason of immature age ought not in the opinion of the Court to be admitted to give evidence or oath or affirmation shall be admitted to give evidence after being cautioned by the court to speak the truth, the whole truth and nothing but the truth.' B C D

On the failure of the sessions court judge to follow the procedure in s 133A of the Evidence Act 1950, the conviction should be set aside. E

Before the court rises there is this observation to make.

Section 38 of the English Children and Young Persons Act 1933 has been repealed and replaced by some other law and perhaps it is time to study why it was repealed and whether we should do the same to our s 133A of the Evidence Act 1950 bearing in mind, too, the experience of other Commonwealth countries on the matter of children's evidence in court and also that in our judicial system jury trials have been abolished. In addition, rules relating to corroboration need a re-look and the necessity for the examination procedures of child witnesses to be child-friendly need to be taken into account. F G

As was remarked by Andrews and Hirst in *Criminal Evidence* at p 256:

> It is increasingly became a cause for concern, in cases involving sexual and/or violent crimes against children, that too many prosecutions were failing, even in cases of fairly clear guilt. There were at least four identifiable reasons for this. In some cases, the competence rules disqualified the children concerned from giving evidence at all, namely where they failed to pass courtroom 'examinations' requiring proven understanding of the concept of truthfulness. If the test was passed, the child's ordeal as a witness was still made far more difficult than it should have been. Children were usually propelled unprepared and unprotected into the intimidating atmosphere of a formal criminal trial, where they often failed to come up to proof. In many cases their evidence had to be corroborated by other evidence before convictions could be based upon it, or was subjected to a corroboration warning, under which the jury would be told that it would be dangerous for them to rely on that evidence alone. H I

A Finally, the similar fact rule as construed in cases such as *R v Inder* (1977) Cr App R 143, worked against the victims of serial child sex abuse, preventing the various victims of such offenders from corroborating each other's stories in all but the most strikingly similar of cases.

In response to these concerns, changes were progressively made to the rules governing corroboration requirements, which have now largely
B disappeared, and to the processes of examination and cross-examination at trial, which are now far more child-friendly. The common law rules governing the admissibility of similar fact evidence have also been relaxed ...

It might be necessary to look at the Pigot Committee Report of 1989 and the legislation following that, the ensuing case law and the present s 33A of
C the English Criminal Justice Act 1988 as amended by Schedule 9 to the Criminal Justice and Public Order Act 1994.

The appeal is allowed. Conviction and sentence are set aside.

Appeal allowed.

D Reported by Chin En Tek

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